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CASE NO._____

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

KNAPP STREET REALTY CORPORATION,

PLAINTIFF-APPELLANT

VS.

WISCONSIN INSURANCE PLAN AND
OFFICE OF THE COMMISSIONER OF INSURANCE,

DEFENDANTS-RESPONDENTS

ON PETITION FOR WRIT OF
CERTIORARI

FROM THE SUPREME COURT OF WISCONSIN

BRIEF FOR PETITIONER

KNAPP STREET REALTY CORP.
PLAINTIFF-APPELLANT
1131 WEST STATE STREET
MILWAUKEE, WISCONSIN 53233
414/271-0931

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414/271-0931

118 pp

QUESTIONS PRESENTED FOR REVIEW

1. Is there "substantial evidence" to support the finding by the Commissioner of Insurance of unrepared damage to Petitioner's property from the October 31, 1976 fire?

2. Was the conspiracy implemented by the Wisconsin Insurance Plan (WIP) for the purpose of discriminating against and wrongfully cancelling Petitioner's insurance a violation of Petitioner's civil rights?

3. In light of WHIP's actions being repugnant to public policy, may WIP be allowed to carry out it's abhorrent behavior in conspiring to deny insurance coverage to Petitioner or any corporation in which Petitioner may happen to posess a majority interest?

LISTING OF ALL PARTIES

All parties to this proceeding are Knapp Street Realty Corporation, Sydney M. Eisenberg, attorney for Plaintiff-Appellant;

Wisconsin Insurance Plan and Office of the Commissioner of Insurance, and Kenney, Krembs and Fellows, Wisconsin Attorney General, attorneys for Respondents.

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The opinion of the Wisconsin Commissioner of Insurance, March 4, 1981, is unreported and contained infra p. 92.

The opinion of the Milwaukee County Circuit Court, June 18, 1982, is unreported and contained infra p. 82.

JURISDICTIONAL STATEMENT

This is a petition for review in relation to a civil proceeding instituted by petitioner against respondent arising as a result of respondents cancellation of petitioner's insurance policy.

On October 5, 1982, judgment was entered in favor of respondent in the Milwaukee County Circuit Court, Case No. 547-508. This judgment affirmed the Decision of the Wisconsin Commissioner of Insurance whom on March 4, 1981 had affirmed and approved the action taken by the governing committee of the Wisconsin Insurance Plan, which had cancelled Petitioner's fire insurance coverage under the Wisconsin Insurance Plan. On November 7, 1983 the Court of Appeals of Wisconsin dismissed Petitioner's appeal. The Wisconsin Supreme Court, on March 9, 1984, denied the petition for review. The United States Supreme Court signed an order extending

the time within which to file a Petition for Writ of Certiorari in the case at bar to and including July 6, 1984. This Petition for review follows.

Jurisidiction is conferred upon this Court pursuant to 28 U.S.C.A. § 1257(3) as Petitioner has timely raised substantial federal questions below and has specifically set up under the constitution and laws of the United States those rights which Petitioner seeks to have this Court enforce.

This Court has jurisdiction to review the violations of Petitioner's civil rights pursuant to 42 U.S.C.A. § 1983 and 42 U.S.C.A. § 1985.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The text of the following constitutional provisions and statutes relevant to the determination of the present case are set forth in appendices:. U.S. CONST. amend. XIV; 42 U.S.C. A. § 1983; 42 U.S.C.A. § 1985, 15 U.S.C.A.§ 1011.

A CONCISE STATEMENT OF THE CASE

This case concerns a wrongful midterm cancellation of a Wisconsin Insurance Plan policy of fire insurance on the premises at 300-318 West Juneau Avenue, Milwaukee, Wisconsin. Complaint was made to the Insurance Commissioner. The cancellation followed complaints to the Insurance Commission and Governor about the failures of the Wisconsin Insurance Plan to settle claims promptly or in good faith.

The first hearing was taken August 30, 1979 at 813 East Michigan Street, Milwaukee, Wisconsin, in the office of the Wisconsin Insurance Plan. The second hearing was held August 31, 1979 at 615 East Michigan Street, Milwaukee, Wisconsin, in the office of the Wisconsin Insurance Plan, over objection because insured's president was suffering from a stroke and heart attack. The third hearing was moved to September 21, 1979, in the office of the Department of Insurance, 123 West Washington Avenue, Madison, Wisconsin, and the final hearing was held October 8, 1979, in the office of the De-

partment of Insurance, 123 West Washington Avenue, Madison, Wisconsin. For the hearings moved to Madison, the desperately ill complainant suffering a recent cerebral stroke and myocardial heart attack had to travel to the Madison, Wisconsin Insurance Commissioner's Office. The rules provided the hearing should be in Milwaukee.

It is submitted that the property in question, known as SYDNEY HiH, located at downtown Milwaukee, within a block or two of the Milwaukee School of Engineering, Milwaukee Area Technical College, Milwaukee-Arena-Auditorium-Exposition Center complex, the new Milwaukee Hyatt Hotell is excellently located. SYDNEY HiH is well maintained and in excellent condition. All necessary repairs were made following each of the two fires.

On May 31, 1979, without notice to Mr. Eisenberg, behind closed doors, and without any kind of public notice, the Wisconsin Insurance Plan's administrators, at the instance of Kenneth Kenney, counsel for the WIP Plan, and Mr. Schwoegler, voted

to deny coverage to any property owned by Mr. Eisenberg or any corporation of which he is a majority stockholder. His appeal in this corporate case brought on a massive retaliation by F.J. Schwoegler and his cohorts.

The record will show and prove that Wisconsin Insurance Plan manager, F.J. Schwoegler, together with others, commenced and participated in a plan calculated to injure financially Knapp Street Realty Corporation, and, in fact, Sydney M. Eisenberg. The vindictiveness of Mr. Schwoegler and those persons who participated in the conspiracy, was promptly called to the attention of the governing committee of the Wisconsin Insurance Plan; former Governor Lee Dreyfus; N.J. Wirtz, Department of Insurance; Martin VanCleve, Department of Insurance; Robert Verdoon, Chairman of the Wisconsin Insurance Plan. The WIP minutes, included in the index herewith, speak for themselves, loudly and clearly.

The cancellation of Febraury, 1979, followed by

Mr. Schwoegler's "most awful" filthy language, screaming, "Achtung, Achtung!" saying, "we don't have to write any policies of insurance that we don't want to. If you don't like it, go sue us." Can only be indicative of a "sick" vindictive insulting bigot.

The complaint speaks for itself. Nowhere, at no time did F.J. Schwoegler ever appear at the hearing to deny that he was a bigot, explain or deny his abuse, or testify under oath as to any part of the misconduct charged against him. He decided, instead, to leave his position.

The minutes of the quarterly meeting of the governing committee of the Wisconsin Insurance Plan, held at the offices of the Northwestern National Insurance Plan of Milwaukee, May 31, 1979, are incredible and a disgrace to the State of Wisconsin. The Circuit Judge chose to absolutely ignore them. F.J. Schwoegler was the secretary of the reviewing group. In this situtation, however, his misconduct was reviewed by himself

and the others Mr. Eisenberg complained of with respect to the cancellation and misconduct of Mr. Schwoegler. Mr. Schwoegler was the Manager of the Milwaukee Office of the WIP who made the original illegal cancellation and whose misconduct was repeated. He stated to the governing board meeting, which, of course, Appellant was unaware of, "Mr. Eisenberg contends the issue is whether the premises are insurable; the Plan firmly contends the only issue is whether the cancellation was valid." Thereupon, it was agreed, with a motion actually taken and carried, that Mr. Eisenberg, as an individual, a partner or major corporate stockholder, is no longer insurable on the basis of his past loss record," and, "The Manager be instructed to take immediate steps to decline renewal of all of Mr. Eisenberg's accounts with the Plan - in a manner to be decided between the Manager and counsel, and consistent with the procedures of the Plan." Counsel, of course, referred to Kenneth Kenney. Here was discriminatory conduct, purely and simply.

The following excerpt, from the quarterly meeting minutes of the governing committee of the Wisconsin Insurance Plan, which took place May 31, 1979, will clarify and amply describe some of the highly improper conduct, all designed to back Manager Schwoegler:

"KNAPP STREET REALTY COMPANY APPEAL TO INSURANCE COMMISSIONER"

"The Manager informed the Committee of the status of this appeal, and distributed information relative to the loss history of the insured. He advised that Mr. Eisenberg's request for another inspection of the premises in question had been approved. While Mr. Eisenberg contends that the issue is whether the premises are insurable, the Plan firmly contends the only issue to be whether the cancellation was valid."

"After further discussion it was decided that the hearing and any further actions that may be called for on the basis of past loss history are separate and distinct issues. After considerable discussion it was moved, seconded, and carried unanimously that the Manager be instructed to take immediate steps to decline renewal of all of Mr. Eisenverg's accounts with the Plan -- in a manner to be decided upon between the Manager and counsel, and consistent with the procedures of the Plan -- in that Mr. Eisenberg, as an individual, a partner, or a major corporate stockholder, is no longer insurable on the basis of his past loss record."

The inspection was only a ruse. The policy was

to be declined in any event! The premises were obviously insurable and any loss record of Mr. Eisenberg, who owned many millions of dollars' worth of real estate in the Milwaukee area, would be immaterial unless he was an arsonist, which he is most certainly not. WIP has changed its reasons for denial many times. The issue is whether a victim can suffer one fire, several fires, or many fires, dependent on the area, and be held personally responsible, even though he had done everything humanly possible to prevent his catastrophe.

Obviously, the cancellation which was singularly addressed to Mr. Eisenberg, came about because he had previously complained to the Insurance Commissioner and other officials about the WIP's failure to settle fire claims for a period of approximately a year in two specific cases. There had been a prior fire at another building at 1201 West State Street, in which case the WIP procrastinated. Similarly, a previous fire at 300 West

Juneau Avenue, the building in this case, suffered by this insured, was handled in the same delaying manner by Mr. Schwoegler.

The Wisconsin Statutes require reasonably rapid settlements by all insurance companies. The law is not to be flagrantly disobeyed by WIP, who treated Section 636.10 Wis. Stats., as a joke. It reads as follows:

"636.10 TIMELY PAYMENT OF CLAIMS. (1) Unless otherwise provided by law, an insurer shall promptly pay every insurance claim. A claim shall be overdue if not paid within 30 days after the insurer is furnished written notice of the fact of a covered loss and of the amount of the loss. If such written notice is not furnished to the insurer as to the entire claim, any partial amount supported by written notice is overdue if not paid within 30 days after written notice is furnished to the insurer. Any part of all of the remainder of the claim that is subsequently supported by written notice is overdue if not paid within 30 days after written notice is furnished to the insurer. Any payment shall not be deemed overdue when the insurer is not responsible for the payment, notwithstanding that written notice has been furnished to the insurer. For the purpose of calculating the expense to which any claim is overdue, payment shall be treated as being made on the date a draft or other valid instrument which is equivalent to payment was placed in the U.S. Mail in a properly addressed, postpaid envelope, or, if not so posted, on the date of delivery.

All overdue payments shall bear simple interest at the rate of 12% per annum."

"(2) Notwithstanding Sub.(1), the payment of a claim shall not be overdue until 30 days after the insurer received the proof of loss required under the policy or equivalent evidence of such loss. The payment of a claim shall not be overdue during any period in which the insurer is unable to pay such claim because there is no recipient who is legally able to give a valid release for such payment, or in which the insurer has promptly notified the claimant of such inability and has offered in good faith to promptly pay said claim upon determination of who is entitled to receive such payment."

"(3) This section applies only to the classes of claims enumerated in s. 646.11(2)."

The Wisconsin Insurance Plan denied any issue was raised by Appellant with regard to the sufficiency of the notice of cancellation. WIP has stated, "we do not address that subject." The fact is that the first notice of cancellation was given contrary to law, because it did not provide even ten days' notice. Upon complaint to the Insurance Commissioner, WIP cancelled a second time. This vicious double cancellation triggered severe problems which were created for Appellant by WIP, and further developed and enhanced by WIP and its re-

presentative thereafter. Certainly this cancellation was part of the over-all picture of misconduct practiced by WIP. These notices were sent to the mortgagee also.

The conduct of WIP toward Appellant is no different from the evidence of plotting evidenced in the minutes of the Board of Governors, who voted May 31, 1979, to approve the conduct of the secretary. These same minutes indicate the intent to treat the United States government the same way. The minutes show that the Board of Governors was contemplating removing WIP from federal control through an action by HUD which might be precipitated by failure of the plan to comply with federal directives. Please examine the following subject, directly ahead of the paragraph entitled, "KNAPP STREET REALTY COMPANY APPEAL TO INSURANCE COMMISSIONER:"

"FEDERAL RIOT REINSURANCE"

"This subcommittee met May 25 in the office of the American Family Mutual Insurance Company in Madison. The subcommittee reviewed the evolution of the Plan and discussed the specific goal that the subcommittee was to accomplish. The subcommittee concluded that the Plan cannot 'divest' itself of federal control, but that upon being given appropriate direction by the

Governing Committee, this subcommittee could seek to have other interests make the necessary changes in laws, etc. The Plan could cease to come under federal control only by an action by HUD, which might be precipitated by failure of the Plan to comply with federal directives. The subcommittee advised that they would monitor the June NAIC meeting in Chicago in order to obtain further input on the situation. It was noted that a recent NAIC central office report was critical of the riot reinsurance program, and that federal monies in responding to insured riot losses had proven to be very secondary to those provided by the individual states.

"There was further discussion relative to the specific purpose of the subcommittee, during which it was noted that relatively few companies are presently purchasing riot reinsurance, but that each company could be construed as having made its statement on the subject by its decision whether or not to purchase such reinsurance. Substantial further discussion ensued, with the consensus emerging that the charge of the subcommittee was to 'investigate and anslyze' all available information on both sides of the issue of federal control and availability of riot reinsurance, and to present the results of their investigation to the full Board for a decision on the future course to be followed."

Any denial of a plot to decline renewal of all Mr. Eisenberg's accounts with the Plan "in a manner to be decided upon between the manager and counsel - consistent with the procedures of the Plan," is subject to review now. For the truth, the minutes of May 31, 1979 speak for themselves.

WIP was not interested in the merits of any situation! It was only interested in hurting Sydney M. Eisenberg and protecting Manager Schwoegler from the consequences of his misconduct!

The October 31, 1976 fire at Sydney HiH and the subsequent payment of $55,000 for damages to the building and $2,000 for the "contents" come about strictly because of procrastination by WIP. The loss of the building elevator equipment worth tens of thousands of dollars was not even considered by General Adjuster R.J. Meyers, who was the Adjuster for WIP, hired by them.

General Adjustment reported to Northwestern National, which, in turn, reported to WIP. Insured was forced to accept the WIP offer because of the interminably long delay and requirement to pay for the completed repairs.

The WIP record and methods of settling claims is truly reprehensible.

I. INSURED KNEW IT WAS BEING "SET UP" BY WIP

When the second fire occured, September 1, 1978, Appellant realized that the procrastination by WIP was part of improper conduct and was wrong. General Adjustment had mishandled the first claim. Appellant then retained a nationally known adjusting firm, Alexander Sill Company, to deal with WIP. WIP again started cutting corners; procrastination and violation of the Statute requirement for prompt settlement was the WIP format. Justice delayed is justice denied.

The damages were ascertained easily and agreed to by General Adjustment, Sill, and Appellant, to be $32, 665. General Adjustment decided not over $18, 463.25 would be paid. Was a check sent for this amount" Did it offer to pay this reduced amount" The answer is "No." Procrastination and delay again violated the Statute, and when the matter was finally settled after Appellant had complained to the Governor, members of the Legislature, and others, notice of cancellation followed within a matter of hours after a check was paid.

The building was structurally sound and insurable. It made no difference, although actually every necessary repair was made. Schwoegler immediately commenced his program of intimidation. The racial and religious slurs by Mr. Schwoegler were never denied, and so stand forever in this record and the annals of WIP.

Unrefuted, also, is Mr. Eisenberg's testimony, as well as the testimony of Mr. Fitzharris, the insurance broker for WIP, that the sudden policy cancellation was destructive to any efforts to reinstate promptly. Insurance at a much greater premium was the result of the slander by WIP.

WIP, in its reply brief, stated: "Mr. Eisenberg testified that the premium charge for such replacement insurance was greater than the premium charge for the WIP policy which was cancelled."

It is astounding in this case that the former Commissioner of Insurance, Susan Mitchell, in her Decision of March 4, 1981, apparently found basically two reasons in her Findings of Fact with respect to the midterm cancellation. She talked about

the fact that the building had sustained several fires, and, the other reason, that the building had not been repaired. These Findings are not supported by the evidence. The claim of "too many fires" was made after Miss Mitchell entered the case.

The vandalism involved no negligence on the part of the insured. This is the purpose of insurance, and the insured should only be attacked when he is in some manner to blame for the vandalism or the fire, either through negligence or arson tendencies. The fact that in the building arson occurs, for example, after the owner of the building, without charge, permitted a worthwhile activity, like the March of Dimes, to use the building for nineteen days for seeing "Haunted House Exhibits on the fifth and fourth floors," should not mitigate against the owner. A child or children, who were apparently evicted by the March of Dimes operation, came back and started the fire in the presence of everyone on one floor. This should hardly be chargeable against the owner.

Each of the other fires have some obvious explanations, such as a restaurant owner having a fire in front of seventy-five people at his place of business, an individual in the rooming house permitting a cigarette to burn in his bed, etc. Under no circumstances should these instances be used against an individual who owns a number of buildings and has had problems with only a few of his buildings, and has paid hundreds of thousands of dollars in insurance premiums.

The motives for the misconduct practiced against the Appellant can be divided into various divisions, because there was more than one motive:

(A) To give Mr. Eisenberg a "rough time" so that he would abandon his continuing exposure of the WIP to be a profit seeking insurance company, which was violating the Statutes providing for timely payment of claims (§636.10 Wis. Stats.).

(B) Deterrence of future complaints was undoubtedly in the minds of Schwoegler, his attorney and the Board of Governors. If a well known individual

like Sydney M. Eisenberg could be successfully threatened, many others, including attorneys and adjusters, would think twice before taking a position against WIP and other insurance companies.

(C) To conceal the fact that WIP had not been acting the part intended by members of the Legislature. Virtually everyone aware of WIP believed it was operating an "assigned risk" program. The Examiner, himself, was reluctant about believing that WIP was not an assigned risk operation. The evidence, however, proved conclusively that WIP operated in the same manner as every other private corporation, to pay claims and to issue insurance policies for the risk. Unknown was the fact that WIP issued policies under the face page of Northwestern National Insurance Company. This operation was conceived and dedicated to the proposition that the public would be misled into believing the risk was an assigned one to Northwestern National. The record proved that the Legislature and the

people of Wisconsin have been mislead by a "pork barrel" proposition that diverted monies which should have been paid to insured instead of to General Adjusting and Northwestern National, as well as the Wisconsin Insurance Plan, itself, since all three were now being paid to pass on every adjustment.

(D) The Board of Governors, Mr. Schwoegler and his counselors realized the nefarious activities of WIP insurance carriers, such as procrastination and diversion of funds, would be exposed. WIP fought vigorously to hide improper activities delineated in this complaint and appeal. Nowhere did counsel for WIP have the slightest intention of letting the Examiner become aware of the May 31, 1979 WIP Board record of Schwoegler's and his attorney's activities to harass complainant and Sydney M. Eisenberg personally.

II. THE TESTIMONEY PROVES WIP WAS GUILTY OF MISCONDUCT

Roger Steinbach, Assisant Manager of WIP, testi-

fied, that the role of Northwestern National is to adjust losses on behalf of WIP, and the Plan has sole discretion in adjusting losses under the WIP. (Tr. p. 26). He explained further:

"Prior to our association with Northwestern National, the Wisconsin Insurance Plan operated under a concept of a pool of companies sharing the losses of the plan and issuing policies as they were allocated by the plan. In 1971, the Wisconsin Insurance Plan had bids among the insurance companies participating in the plan for a single serving company on the concept that it would save money for the plan. This has proven to be the case ---." (Tr. p. 27).

"...the Insurance Services office is contracted with the Wisconsin Insurance Plan to provide inspection services." (Tr. p. 29).

"...it is an engineering-type of analytical analysis of the property plus photographs are taken in order to underwrite the property."

On page 28:

"A. We may receive applications for insurance through any agent licensed in the State or by the insured himself coming in and talking to us at the Wisconsin Insurance Plan. Upon receipt of the application, the Wisconsin Insurance Plan obtains an inspection of the property, determines applicable rate and physical condition for underwriting, a quote is sent to the applicant and upon receipt of payment for this insurance, the policy is issued. A copy of the policy is not furnished to Northwestern National except in the event of a loss and Northwestern National handles the losses, including the adjuster and is reimbursed for all allocated loss expenses on the basis of three percent,

for paid losses is reimbursed for all unallocated expenses.

"Q. When that policy is issued, it is issued so as to appear as a Northwestern National policy?

"A. Yes, it is issued on Northwestern policy face.

WIP is thus being operated as a corporation for profit, in every respect like a private business. It is not an "assigned risk" proposition at all, is dominated by F.J. Schwoegler and the Northwestern National Insurance Company, and is in no way operated as intended by the Legislature. This set-up caused WIP to scrounge for profits and skim funds which should have been available to handle claims fairly to the various adjusting firms. On August 30, 1979, Mr. Eisenberg stated that he had not agreed to the place of the hearing being removed to the WIP office in Madison.(Tr. 2, 3).

"MR. EISENBERG: Let the record show I was the one that said I have not agreed to the place.

"THE HEARING EXAMINER: Well, Mr. Eisenberg, you are not a party to this proceeding as an individual, are you?

"MR. EISENBERG: I filed the complaint. I made the complaint. I was told to produce the witnesses.

I was to substantiate my complaint. I am prepared to.

"...MR. EISENBERG: To make the record clear, I am not appearing for anybody but myself as president of the corporation which is involved here. I have no attorney. I am speaking for myself.

"THE HEARING EXAMINER: Very well.(Tr. p. 4).

Mr. Kenneth Manista, representing the Alex N. Sill Company, a public adjusting firm, testified that his firm was one of the largest in the United States. He produced his file concerning the loss at 300 West Juneau; said he dealt with insurance companies all over the country, and that most of the adjustments the Sill Company handled were with the General Adjustment Bureau.

It was pointed out that the Wisconsin Insurance Plan, operating as a business, was hiring both the Northwestern National Insurance Company and the General Adjustment Bureau to adjust the Knapp Street Realty claim. The question was raised on many occasions as to why Wisconsin Insurance Plan, which complained of losing money, was using two separate adjusting firms, besides its own firm.

Mr. Eisenbergs uncovering of this irregular situation one of the reasons why his insurance policies were cancelled?

The hearing examiner said Mr. Manista was qualified as an expert, and with his background he was qualified to tell what he had done. (Tr. p. 8 of 8/30/79).

(We are referring to the August 30, 1979 Transcript, unless otherwise stated.)

Mr. Manista testified as to bringing other expert members of his staff to the premises; (Tr. p. 10), who were also present, and participated in the settlement work. They made an independent investigation of the building, and went through the entire structure and found substantial damage to the fourth floor and roof areas, water damage throughout the structure, also floors were smoke damaged. They recommended and filed a Proof of Loss for $48,463.01. A Proof of Loss was filed with the Northwestern National Insurance Company.

Mr. Manista testified that he had been deal-

ing with R.J. Meyers of the General Adjustment Bureau. He was in a position to discuss the scope of the loss, and the extent of the damages twenty-one days after the fire (Tr. p. 17). Mr. Meyers stated he would need a few weeks to review the claim.

> "This is not an investigation of the WIP plan. This is a proceeding to determine whether or not the decision of the Governing Board should be affirmed or reversed. The matter of expediency and determining the claim seems to me to be relevant....."

The fire in question took place September 1, 1978. An offer was made October 12, 1978, in the sum of $30, 154.27 against the filed Proof of Loss of $48,465.01.

On page 25 of the Transcript the negotiations are further explained. Mr. Manista requested that the actual cash value should be in the area of $33,154.00 after receiving Mr. Meyer's offer of $30,154.00 on November 15, 1978. Mr. Meyer's made an offer of $18,436.25. Mr. Manista would not recommend the offer. On January 30, 1979

a new offer was made of $22,500.00, which Mr. Manista did not consider fair or equitable. The company made a new offer of $23,750.00

> "The Hearing Examiner at this point sees a possible correction between settlement of a loss and notice of revocation or mid-term cancellation within a few days thereafter. He will have to decide at the conclusion of the hearing whether or not there is a definite correlation. But at this point, he recognizes it may be so this line of interrogation may continue." (Tr. p. 246)

The illegal notice of revocation was just five months after the Appellant had complained to the Governor and members of the Legislature. The Northwestern National Insurance Company claims that Jean Bogie (Tr. p. 247) testified that she knew the damage had been agreed upon as early as October, 1978:

"Q. I just want to ask you if you are aware, however, of the fact as early as October the items of damage had been agreed to?

"A. Yes.

"Q. So you knew about the $30,000 figure?

"A. Yes.

"Q. All right. The only question that was left was the question as to whether or not there was enough insurance, is that right?

"A. That and depreciation."

Ms. Bogie, in her records on which she based her report, had in 1976 improperly listed the land value based on a City of Milwaukee Tax Bill. (Tr. p. 252), which has nothing to do with fire damages! Since the assessment was originally made in May 1976, however, it is obvious that the assessment which she used was made prior to the date of the first fire in October, 1976, and was not the value appraised at the time of the fire. It is incredible that she would use these dates to claim that these figures indicate the building was unfinished. The second fire was apparently in September, 1978, and this type of testimony simply helps prove that there was no basis for the cancellation. She denied (Tr. p. 262) that the property was over-insured, though she admitted she used the tax bill figures as a basis for value. Her claim that she inspected the building can only indicate that if

she was ever in the building, she was not aware of its condition. She knew nothing of the repairs. The policy was cancelled February 7, 1979. All four properties, constituting Sydney HiH were one complete property which had been bought for about $45,000 without any remodling whatsoever. The 2nd fire took place approximately 9/1/78 (Tr. p. 255). Ms. Bodie testified that the $9,000 assessment reflected property which had been damaged, and on which there were unrepaired damages (Tr. p. 258). She then stated that from an observation of the tax records she concluded the property was only worth $9,000 (Tr. p. 260). She had no training as an appraiser.

Mr. Eisenberg made an offer of proof (Tr. p. 262) that the $9,000 in the assessment referred to only one of the properties involved in the Sydney HiH complex. She admitted (Tr. pp. 262,263) that she had made no attempt to contact the assessor and determine what repairs, if any, were not made. She further admitted that if the letter of rejection

had been sent out it was in the file (Tr. p. 266), and that there was a rejection on the proof of loss, which had been in the sum of $48,000.00.

Ms. Bogie admitted that the first proof of loss had been rejected completely. (Tr. p. 267). She must have believed there was no damage, otherwise she should have made an offer. She admitted that Knapp Street then petitioned for arbitration. The hearing examiner stated that this would have to be in the nature of an offer of proof and then granted the offer of proof that an arbitrator had been selected. (Tr. p. 270)

Ms. Bogie denied the claim November 7, 1978 (Tr. p. 271) that an arbitrator had been selected. She testified that she was not in a clerical position, but a "claim supervisor" (Tr. p. 275). She said she had the final decision and that she was a direct contact with the Wisconsin Insurance Plan office with respect to claims. She said she transmitted information to the Wisconsin Insurance Plan February 6, 1979 (Tr. p. 276). She said she

met with Schwoegler, February 6, in the morning (Tr. p. 271).

On Exhibit 19, Mr. Kenny objected to a note which was found on the last page which reflected Kenney's recommendation with regard to the subject of this particular risk. He claimed this was privileged matter and proposed that his note reflecting his recommendation be excised from the exhibit by tearing off the last page, that portion porports to reflect communication involving him as attorney for the Wisconsin Insurance Plan. The hearing examiner marked it as "Exhibit 20," and accepted it as "Exhibit 19." Mr. Eisenberg objected to severing the document, which was done openly, but without permitting complainant to read it.

"Q. Now, madam, during the recess, the Examiner left the room. You went into another room with Mr. Kenney and the document, removed it from the room. Is that right?

"A. Yes, sir." (Tr. p. 282 Jean Bogie answering).

This irregular conduct by Schwoegler was obviously part of a conspiracy with Jean Bogie, with the commendation and recommendation of Kenneth Kenney.

All the records of the WIP concerning this matter were subject to review, and under no circumstances could Kenneth Kenney claim his recommendation was privileged communication.

"Under the general rule of privilege, a client has the privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purpose of facilitating the rendition of professional legal service to the client." Wis. Stat. § 905.32(2).

The statement made by Kenney only relates to this recommendation, and to statements made by a client. The overt conduct involved in this cancellation calls for an explanation.

Jean Bogie testified that she knew nothing about the 50,000 people visiting the building when the March of Dimes used it, immediately before the 1976 fire. She said she knew of four fires in the building in the last hundred years, (Tr. p. 283). When asked how many fires she knew of in the hundred-year period prior to February 6, 1979, she said she only knew of the 1976 fire and the second fire of September 1, 1978.

Mr. Eisenberg made an offer of proof that Jean Bogie was extremely distrubed by the fact that she had to leave early when Mr. Eisenberg was pressing for the insurance check which was due on February 5. (Tr. p. 283). This offer was denied. The very next morning, February 6, 1979, she went to see Mr. Schwoegler. She had had no appointment with Schwoegler. She said it was her determination (Tr. p. 191). Ms. Bogie claimed that she visited the property January 26, 1979, she made no notes or entries as to her observations, and had no idea what day of the week it was (Tr. p. 295) She examined her notes and found no record as to when she had been there. She did not notify the insured that she was coming (Tr. p. 296). When asked if this was unusaual, she said, "I can't answer that question." She said she had never been in the building previous to January 26, 1979 and had no way of knowing what the damage was except through photographs and records in the file. (Tr. p. 297). An examination of the picutures

brought a concession from Mr. Kenney (Tr. p. 298) that the photographs were of September 1, 1978 fire. She said there was unrepaired charring of timbers in the roof structure and smoke damage, but could not tell where such areas were. (Tr. p. 299). She said the unrepaired charring was in the roof structure. She had no knowledge that the roof had been rebuilt (Tr. p. 301). She said she did not see any evidence of a steel roof when she was there in January. She failed to observe steel supports for the roof (Tr. p. 302). She did not examine the walls for their fire resistancy. Fire resistant Gypsum Board had been used. She said it was the central building at either the 3rd or 4th floors, she did not know which, in answer to whether or not in the central building she had observed plaster and wood lath, or whether they were bare of it. She said 5/8" (fire resistant) Gypsum Board was called Dry Wall. She finally stated she was "not a construction person," and could not answer.

(Tr. p. 307). She said that if the building had been fire-proofed since 1976 it would not have made any difference to her recommendation. In answer to the examiner's question as to how she could tell whether the smoke damage came from the 1976 or 1979 fire, she stated "There was evidence of smoke at the junction of the roof which obviously came from a different direction than the fire which was at the extreme end of the building on the 4th floor." She did not know the area of the damage in feet or yards (Tr. p. 308), and would only say that the smoke was in the central section where she did not see the steel roof. Finally, she said she saw smoke damage in the flooring of the 3rd floor, and areas on the 4th floor. She did not observe that in the area the damage took palce both floors had been re-tiled. She could not explain the smoke damage further. (Tr. p. 312).

From all of the above, it is questionable that she ever saw the place. She apparently drew a

conclusion from the pictures of the fire relating to settlement discussions after the first fire.

The testimony by adjuster Robert Meyers on behalf of G.A.B. Adjusters belies the statements made by the counsel for the Wisconsin Insurance Plan. On October 8, 1979, it became apparent that something reprehensible had occurred. The following testimony is exemplary. (Tr. p. 15-19)

"MR. EISENBERG: This is an administrative hearing. The fact that Mr. Meyers conceded in this exhibit that the building had been repaired, I think, is tremendously important. So as to the significance of it, there can't be any question that this, in effect, should resolve this entire case but even going further, Mr. Kenney does not appear in this case of record, although I suspect it, that his movements as you've seen have been very unfriendly to him all through the hearing. I suspected that he maneuvered this situation. I submit this witness works for an independent company. They have indicated that G.A.B. firm is an independent company. They were not in a position to settle a matter. All they could make were recommendations to Northwestern National and Northwestern National had the situation where they were handling damage claims for Wisconsin Insurance Plan. Many things have come out here which are very confusing but at this point when that letter was sent it was not during the course of the hearing where this witness has represented Mr. Kenney. He had not.

He never claimed that Mr. Kenney was his attorney. He never exerted the privilege...

As I understand it, the privilege can only be exerted by the client not the attorney, and Mr. Kenney has been exerting privileges ... Mr. Kenney takes the position that any witness to a situation is privileged. It is not true. That is not the law in this state and never had been and isn't the law anywhere else.

"HEARING OFFICER: You are repeating yourself, Mr. Eisenberg. Do you have any further points to make?

"MR. EISENBERG: I think I've covered it.

"HEARING OFFICER: Mr. Kenney, do you have any response?

"MR. KENNEY: I reiterate simply that Mr. Meyers is a representative of Northwestern National and Wisconsin Insurance Plan and all of the activities that he has had referable to this matter and like any agent his communication with counsel for the principal whom he is serving are privileged. I didn't expect that Mr. Meyers was in a position -- he is not a lawyer. He doesn't have a legal education but I think that I am entitled on behalf of Wisconsin Insurance Plan and Northwestern National to assert that privilege.

"MR. EISENBERG: May I just reply for a moment. I think this is a pure and simple fraud being perpetrated.

"HEARING OFFICER: I don't care for your vituperation. Just argue law.

"MR. EISENBERG: From a legal standpoint, I think it is wrong for a lawyer to hide behind any cloak. I think that this clearly says--

"HEARING OFFICER: I can read the exhibit. I can see what it says. The Exhibit 54 consists of two reports to Northwestern National Insurance Company, both dated May 30, 1979, both identified as having been work product of either R.J. Meyers or Kent J. Ohlis.

"MR. KENNEY: We are not asserting the privilege as to those reports, Mr. Examiner.

"HEARING OFFICER: And attached to those reports appears to be a copy of a May 29, 1979 letter addressed to Mr. Kenneth M. Kenney, Attorney at Law, appears to have been signed by or for R.J. Meyers and the copy of the letter indicates that a copy of it went to Jean Bogie and the Northwestern National Insurance Company. This exhibit does not appear to be the work product of an attorney and it does not appear to be part of an investigation made by an attorney but it appears to be a report to Northwestern National Insurance Company previously identified in this preceeding as the insurance company under contract with WIP Plan to investigate plans. The exhibit is certainly relevant. It tends to substantiate, clarify and perhaps refute in part previous testimony in this matter from Mr. Meyers. The exhibit will be received."

Exhibit 54 refutes completely that the premises were not substantially repaired and proves that the defense is full of fabrication. Mr. Eisenberg at all times maintained that he was a victim of a fraud and exhibit 54 proves it.

Clearly, the first fire in 1976 took place in the center of the 3rd floor (October 8, 1979,

Tr. p. 22), and the 2nd fire in 1978 took place place in an entirely different area. That the 2nd floor fire took place in the northeast corner of the building adjacent to North 3rd Street is beyond doubt. There can be no question but that the rafters on the 4th floor were doubled up and then painted (October 8, 1979 Tr. p. 36), and that doubling the joists gave additional strength (10 8/79, Tr. p. 38). When Meyers stated that some areas were stripped down to bare masonry wall and a finished wall had not been installed, his testimony falls in the face of the fact that the Appellant explained that using a bare wall for a studio lessend the chance of fire damage. This in no manner made the building susceptible to fire damage. It was not necessary to cover a brick wall when many people prefer a brick wall to wall board.

The reluctance of Mr. Kenney to permit answers is demonstrated by the following colloquies which also prove the damage was repaired.

"Q. Now with reference to finishing the walls, did you know that we had decided not to cover the brick walls but to leave them in a state of brick because that was aesthetically attractive in our opinions?

"A. I don't know that.

"Q. You said that the walls weren't finished. Is there something in the policy that says that I've got to put some wooden - flammable wood or plaster over a brick wall where there is a tendancy in the architectural field today to keep brick walls as they are?

"MR. KENNEY: The policy speaks for itself. I am going to object to that. The policy speaks for itself and would be the best evidence.

"HEARING OFFICER: I think that's true but this man is qualified as an expert adjuster and he certainly would understand the general framework of policies and I take it all of us would recognize that there is no requirement in a policy that a wall must have a particular finish on it. So why do we quibble?

"MR. KENNEY: Well, then what's the point of the question?

"MR. EISENBERG: Well, Mr. Meyers nodded his head. I would assume he meant yes.

"A. I was going to say obviously not.

"HEARING OFFICER: Proceed.

"Q. There is no requirment?

"A. Right.

"Q. If you said in your direct testimony that there were walls that were unfinished will you concede that it may very well be that we want those walls to be unfinished?

MR. KENNEY: It is argumentative. I mean I don't know how the witness can fairly answer the question.

"HEARING OFFICER: This is cross-examination.

"MR. KENNEY: I don't care if it is cross-examination, Mr. Examiner. There is still some limitation on cross-examination and it doesn't amount to speech giving by the cross-examiner.

"HEARING OFFICER: I think we waste more time arguing about the admission and nonadmission than if we would just answer the question. The answer is obvious.

"A. I don't know you what you are going to do with it. I am only testifying that it is unrepaired fire damage. If you removed a finished wall, the bare masonry wall and then left it in that condition it is still unrepaired fire damage. If you have another fire in that same building it is in the same general area, I as an adjuster would have no way of knowing whether you had a finished wall on that wall or not.

"Q. Well, will you concede, sir--

"HEARING OFFICER: We will not pursue this any further.

"MR. EISENBERG: The answer is obvious.

"A. All right, with reference to the roof not being repaired, why do you say the roof wasn't repaired?

"A. There are charred roof embers over the 4th floor of the far east building.

"Q. Do you know that there were as many as 20 or 25 people there hired by us immediately after the fire to remove debris and to make the building airtight, windproof?...

"MR. KENNEY: I am going to object to the form of the question. It is a matter of testimony by Mr. Eisenberg.

"HEARING OFFICER: Well, the Hearing Examiner won't pay any attention to the testimony. Now Mr. Eisenberg testified as a witness and he was under oath when he did so. That testimony will be considered. The testimony that he gives by asking questions will not be considered as testimony.

"MR. KENNEY: Fine.

"HEARING OFFICER: Do you know whether 25 people went there after the fire and cleaned up the mess?

"THE WITNESS: I haven't any idea how many people were there.

"Q. You have notes, have you not?

"HEARING OFFICER: How can that be material, Mr. Eisenberg?

"MR. EISENBERG: Because he made a note. He does know that there were 25 people working on the roof and making it airtight.

"THE WITNESS: I'm sorry, I was thinking about the second fire. The first fire, yes, I knew you did because I was there when they were claning up.

"Q. I don't want to be accused of putting words in your mouth.

"A. I misunderstood. I thought we were talking about the second fire.

"Q. That building was made airtight, wasn't it?

"A. Yes.

"Q. And then the second fire, there was a winter that was very severe in Milwaukee, isn't that right?

"A. We would have had two winters since that first fire.

"Q. But as to the last winter?

"A. Yes.

"Q. And I will ask you when you went there in January did you find any reason to believe that the building wasn't airtight against that winter, including the roof?

"A. No.

"Q. Now with reference to the floor tile that you say was not repaired, I will ask you if it is a fact that on the 4th floor where the last fire was that nice new red floor tile was inserted after that fire?

"A. When I was speaking of floor tile, I was speaking of the lower levels, not the 4th floor.

"Q. Okay, the floor tile was replaced where the fire was?

"A. Y[illegible] I believe it was.

The only logical conclusion one can draw after reading all the testimony is as follows:

The first fire settlement was "stalled" by WIP, its adjsuters and Ms. Bogie. Their stalling tactics resulted in tremendous amounts of interest on investments accruing to WIP. However, the statute which provides for prompt settlements, namely Section 636.10 of the Wisconsin Statutes, was violated. Appellant justly complained to the Governor and members of the Legislature, as well as to the Insurance Commissioner. Section 636.10 of the Wisconsin Statutes was disregarded by WIP and Mr. Schwoegler. Jean Bogie became hostile for the additional petty reason that she was in a car pool and objected to waiting, even though the time was such that her office was supposed to stay open. She made a big thing about it. She communicated with Mr. Schwoegler, and disregarded the Meyers report of completion. After Mr. Eisenberg complained a second time to

the Governor, Insurance Commissioner and members of the Legislature, Mr. Schwoegler decided on a course of revenge. The fire insurance policy was cancelled, and it was done so quickly that the notice was illegal and had to be redone. Mr. Schwoegler then proceeded to cancel all Wisconsin Insurance Plan policies, corporate or personal, without rhyme or reason in the event Mr. Eisenberg was either applying individually or as a major stockholder of any corporation. The condition of the building would mean nothing to the Wisconsin Insurance Plan. The probability of fire damage no longer had any meaning.

To add to the intimidation, "Achtung, Achtung!" was added.

Mr. Eisenberg properly evaluated all of this misconduct and made a complaint to the Insurance Commissioner about the cancellation. The WIP representatives were again disturbed. They complained to the Referee considering the reinstatement of Mr. Eisenberg's law license in that he was practicing law without a license by making his com-

plaint to the Insurance Commissioner. The Hearing Examiner placed in the record that Mr. Eisenberg was not appearing as a lawyer.

It is obvious that it was important not only that Mr. Eisenberg stop exposing WIP operations, but that he not be given the credence of an attorney to further expose its operations. His civil rights were trampled over. Defendant WIP sought several untruthful defenses. One was to the effect that Sydney HiH had not been rebuilt from the first fire. The fact is that private funds had to be used for the rebuilding because WIP did not pay off on its insurance until long after the work was done. However, it was done, at great cost and human effort. The WIP had followed through with its cancellation, immediately after paying for the fire damage.

The cancellation was arbitrary, capricious, unfair, atrocious and unreasonable. The hearing itself, disclosed untruthfulness. The testimony proves that WIP is not an assigned risk operation.

It is operated as a private corporation, and certainly violates the concept intended by the Legislature of the State of Wisconsin. The Wisconsin Insurance Plan is paying Northwestern National Insurance Company and G.A.B. Adjusting Company to evaluate and adjust the same claim as it did in the instant case. The Wisconsin Insurance Plan personnel also evaluated the claim. So you have three individual entities collecting for the adjustment of a claim.

The result is that the insured is paying "through the nose" for adjusters while claims are not being adjusted promptly and the people of the State of Wisconsin, as well as the insured herein, are being mistreated. The vituperation of the Plan Administrator, Mr. Schwoegler, was so pronounced that he could not wait to cancel the policy. He cancelled the policy without proving the required statutory notice. The building owner-president's upset was justified as obtaining insurance on a commercial property within a matter of hours is virtually impossible.

The Wisconsin Insurance Plan was created under the

aegus of the State Statute providing for citizens of Wisconsin insurance coverage which they are otherwise unable to obtain. The intent of the Legislature on this point is amply clear, and has been loudly hearlded by the Wisconsin Insurance Plan as serving a function for those who are unable to obtain fire insurance. The fact is that, the public has been misled and deceived. There is no reason why proper underwriting would not create rates which all victims of arsonists could meet. The arrogant misconduct of those handling the problem can only be cured by removal, payment of damages, and exposure to the public.

The conflict of interest involving Attorney Kenneth Kenney should have required him to remove himself from this case. Although the Attorney General entered Notice of Appearance at the pretrial, Attorney Keenth Kenney served the Circuit Court breif despite the fact that he was deeply involved in the misconduct. No hearing or even arguments were permitted by the Circuit Court Judge.

It is submitted that the building which is the subject of this cancellation has been completely repaired, and that there is and never was any justification for the cancellations in question.

The building in question at the time of the Cole hearing has been fully repaired. It did not have to be and could not be made into the exact previous condition, because a portion of the roof which had been damaged was replaced with a steel roof. Obviously, the steel roof was more fire retardant than the wooden roof which had been burned.

Complainant maintains that the argument by Wisconsin Insurance Plan to the effect that repairs had not been completed are not borne out by the evidence, are specious, and, in fact, utterly ridiculous. Anyone can say that the premises had not been completely repaired. However, the actual proof shows otherwise.

III. THE RESPONDENTS ADMITTED THE PROPERTY HAD BEEN REPAIRED

Only persistence by Appellant evolved and elicited the final testimony by Respondent's Adjuster,

Meyers, that he knew and had coveyed to counsel for WIP the fact that the property was in effect repaired and insurable. Appellant was obviously severely wounded by the cancellations practiced by WIP and its cohorts, to the effect that the property was not insurable in the eyes of WIP. The reason is that wherever Mr. Eisenberg sought insurance coverage, he discovered that insurance carriers were calling WIP to determine the reason for cancellation, and that they reported to Mr. Eisenberg that they had received negative replies. Respondent's claim that an offer of a different kind of insurance received at a tremendously increased price permits exoneration of WIP and its Board of Governors, is unsound, incongruous, irrational, and meaningless.

§ 619.01 of the Wisconsin Statutes provides that property owners are entitled to coverage for risks which are otherwise unobtainable. There has been no evidence in this case that any insurance was obtained from any licensed Wisconsin insurance

carrier. Appellant submits that buying insurance outside of the country at a huge charge for insurance dissimilar to ordinary insurance coverage means just that. Nothing in this record shows that corporations outside of the state providing insurance coverage are any different from insuring with people who make a market for gambling losses at Las Vegas, Chicago, or New York. This type of argument by WIP reminds one of the individual pleading for mercy because he was an orphan after he did away with his parents. WIP did not produce as a witness any other insurance carrier who declined insurance for any reason other than the fact that WIP had refused it. The Wisconsin Insurance Plan also operates the rating bu eau and does not prevent increased premium rates in the property insurance industry itself. Its claim that it does so is belied by the testimony which indicates that WIP evaluates conditions and increased costs at the time the policy is issued. Other insurance brokers call the rating bureau, which lost not time in discouraging them.

IV. RESPONDENTS DISCRIMINATED AND CONSPIRED AGAINST APPELLANT

The courts have been very definite in enforcing conspiracy laws. See e.g., Drexler v. Zohlen, 216 Wis. 483, 257 N.W. 675:

"All that is necessary to constitute conspiracy between two or more persons to wrong another is that alleged conspirators arrive at understanding to commit the wrong, and such understanding may be merely tacit and need not be expressed."

The case of Judevine v. Benzies-Montanye Fuel & Warehouse Co., 222 Wis. 512, 269 N.W. 295, 106 A.L.R. 1413:

"In Wisconsin, it is a legal wrong for two or more persons to conspire to do an act, to the injury of another, which one person acting alone might lawfully do.:

The case of Boyce v. Independent Cleaners, Inc., 206 Wis. 521, 240 N.W. 132:

"When, by compulsion, or voluntarily, one joins with others and performs for them, his acts become their acts."

The case of Martens v. Reilly, 84 N.W. 840, 109 Wis. 464:

"Wis. 1901. Where one or more persons conspire with another to effect the violation of a contract, and the object of a combination is consummated to the damage of a third person, such third person has action to recover the damages against him who breached the contract and every person who, by reason of the combination, is connected with the wrong."

The case of White v. White, 111 N.W. 116, 132 Wis. 121:

"Wis. 1907. Each party to a conspiracy is liable to the person injured, regardless of the degree of his activity in effecting the unlawful purpose."

The case of Doremus v. Hennessy, 176 I11.608,

52 NE 924, 54 524:

"A good cause of action may be based on a claim for damage resulting from a conspiracy to unlawfully destroy or injure the plaintiff's business, as by a boycott."

The case of Stein v. Schmitz, 21 NJ Misc 218, 32

A2d affd 137 NJL 725, 61 A2d 260:

"This is also true of a claim for damage resulting from a conspiracy to have the plaintiff wrongfully deprived of the right to exercise his profession."

The case of Schultz v. Frankfort M. Acci. & P.G.

Ins. Co., 151 Wis. 537, 139 NW 386:

"This was held to be the case, for example, where plaintiff was subjected to an ostentatious and prolonged shadowing by detectives, thereby proclaiming to the public that plaintiff deserved surveillance."

The case of Horn v. Ruess, 72 Ariz 132, P2d 756:

"A conspiracy to slander the plaintiff appears to be actionable."

The WIP tactics were initiated, developed,

and practiced intending to mislead both Appel-

lant and the Hearing Examiner through maneuvers by WIP. For example, WIP offered to re-examine the premises. Examiner will recall, and there is correspondence in the Examiner's file to prove that Mr. Eisenberg waited an entire afternoon for the WIP so-called inspectors to make their reinspection at Sydney HiH. They never appeared.

There is no way that Appellant could have known of the May 31, 1979 WIP Board of Governors' evil decree. The supoena of the records finally resulted in the exposure of the Adjuster Meyer's revelation that both he and the WIP attorney knew the repairs had been made. Surely incredible!

The WIP is not a charitable, honorable, eleemosynary type of operation, but one operated like a misguided private institution, with unjustified prestige, wrongly touted and considered by the public as a quasi-public operation.

V. THE CALCULATED CONSPIRACY BY THE WISCONSIN INSURANGE PLAN AND IT'S ADMINISTRATORS HAS INFRINGED UPON PETITIONER'S CONSTITIONAL RIGHT TO DUE PROCESS AND EQUAL PROTECTION UNDER THE LAW

Petitioner has sufficiently set forth allegations of

due process violations under U.S. Const. Amend. XIV, and has presented numerous instances of conspiracy by WIP against Petitioner. That WIP has conspired and discriminated against Petitioner in retaliation from Petitioner exercising his rights to have his grievances reviewed is clear. As WIP is a creation pursuant to Wis. Stat. Ann. § 619.01(West 1977), its blatant violation of Petitioner's due process rights through its conspiracy warrants a cause of action under 42 U.S.C.A. § 1983, (hereinafter § 1983). § 1983 grants a distinct cause of action for deprivation of due process under color of state law. See e.g. Ortega v. Ragen, 216 F.2d 651, 563 (7th Cir. 1954). Further, WIP's arbitrary disregard for Petitioner's rights in denying insurance coverage not only to Petitioner, but to any corporation in which he has a majority interest, is such a display of WIP's belief that it may arbitrarily discriminate against whomever it pleases for whatever reasons, that WIP's actions are an insult to the integrity of our governmental system and contrary to the statutory purpose of WIP's creation.

The remedies respectfully requested of this Court by Petitioner, would be consistent with the policies underlying § 1983. These policies include compensation of person's injured by deprivation of federal rights and prevention of abuses of power by those actions under color of state law. See e.g. Carey v. Piphus, 435 U.S. 247, 254 (1978), Mitchum v. Foster, 407 U.S. 225, 238-42 (1972). The actions by WIP constitute a conspiracy against Petitioner to wrongfully deny him from the insurance coverage to which he is entitled. The record indicates a series of events and proceedings amounting to a violation of Petitioner's due process rights. WIP cancelled Petitioner's insurance before any proper investigation and without Petitioner's knowledge. Further, WIP had given contradictory reasons for cancellation, some of which are clearly against the evidence. In addtion, unsupported findings by the Commissioner, the illegal notice of revocation, and WIP's behavior which was clearly for the purpose of misleading Petitioner and the hearing examiner, are exemplary of

Petioner's due process deprivation.

Petitioner was beyond doubt deprived of procedural due process by persons acting by authority of a state created institution and therefore recovery under § 1983 has been apparent from the outset. "The right to procedural due process is absolute in the sense that it does not depend upon the merits of the claimants substantive assertions, and because of the importance to organized society that procedural due process be observed." Carey v. Piphus, 435 U.S. 427 at 666 (1978). In fact, many lower federal courts have awarded nominal damages under § 1983 for deprivations of constitutional rights where actual injury had not even been shown. See e.g. Thompson v. Burke, 556 F.2d 231, 240 (CA 3 1977). As procedural due process is designed to protect persons from unjustified or mistaken deprivation of life, liberty or property, Carey at 258, the actions and proceedings by WIP and the subsequent proceedings, clearly denied Petitioner of this fundamental right. Relief for which is provided by § 1983.

In addition, Petitioner has set forth sufficent statements throughout the record to justify relief under 42 U.S.C.A. 1985(3), (hereinafter § 1985(3)). § 1985(3), although it does not apply to a conspiracy to deny due process, Collins v. Hardyman, 341 U.S. 651, 661 (1951), provides a civil remedy for all deprivations of equal protection of the laws, and equal privileges and immunities under the laws, regardless of its source. See Griffen v. Breckenridge, 403 U.S. 88 (1971). (Private acts cognizable under § 1985(3).

The WIP, is a plan formulated by the Wisconsin Commissioner of Insurance for the benefit of all Wisconsin citizens. WIP's blatant discrimination on the basis of Petitioner's race and Jewish religious beliefs is prevalent by racial and religious slurs directed to Petitioner by WIP's manager at the time, who chose to resign soon after he performed his part in the conspiracy. Petitioner has established all the necessary elements for a cause of action under § 1985(3).

First, he clearly had alleged a conspiracy. Second, he alleged the conspiracy deprived him of equal protection, and privileges under the law. Namely being, WIP's decision to prohibit Petitioner or any corporation in which Mr. Eisenberg has a majority interst, from the right to contract freely with WIP as may every other qualified citizen of the state of Wisconsin.

Third, an act by at least one of the conspirators in furtherance of the conspiracy is clear in the record, especially in the minutes of WIP's secret meeting. Finally, Petitioner has shown personal injury such as through his increased rates. Griffen v. Breckenridge, 403 U.S. at 102. (setting forth these four elements). Since these four elements are met and Petitioner's ethnic and religious heritage were a basis and perhaps the basis behind the alleged conspiracy by WIP, relief under § 1985(3) is warranted.

VI. THAT THE GREAT INJUSTICE AND INSULT TO THE INTEGRITY OF OUR GOVERNMENTAL SYSTEM RESULTING FROM WIP'S ABHORRENT BEHAVIOR HAS REMAINED UNREMEDIED IS AN ANOMALY MANDATING RE-EX-

AMINATION IN THE INTEREST OF PUBLIC POLICY

WIP's actions against Petitioner, and most likely against other law abiding citizens who have asserted their rights against WIP, warrants the attention of and remedial measures by this Court because of WIP's unfettered abuse of power being so contrary to public policy as to threaten our very system of government. Congress has left the regulation of the insurance business to the states because to do so was believed to be in the public interest, 15 U.S.C.A. § 1011 (hereinafter § 1011). WIP's acts of conspiring against Petitioner, which were vindictively based, is plainly against the purpose of § 1011 delegating much authority to its states. Although regulation of insurance is a matter best left to the states, WIP has not only strayed from the goal's for which it was formed, but has saw fit to cast aside its responsibilities to its citizens. WIP needs to be reminded that it is ultimately under the control of Congress and is not an autonamous organization which may arbitrarily use its position to violate basic fundamental rights. See

1945 U.S. Code Cong. Serv. 671, making clear that insurance is "commerce," and ultimately subject to the control of Congress.

Such statements by WIP's manager as "Achtung, Achtung! we don't have to write any policies of insurance that we don't want to," is not only contrary to the purpose of WIP's formation, but also a disgrace to the system itself! WIP was created for the purpose of reducing the residual market in Wisconsin and was "designed to provide basic property insurance to responsible applicants throughout the state of Wisconsin who have been unable to secure such coverage in the normal insurance market." Wis. Stat.Ann § 619. (Comm. notes 526, West 1977). WIP's harrassment to Petitioner is extremely damaging to the public interest. If Petitioner is not granted relief, those who WIP chooses to single out in the future will understandably be hesitent to enforce their rights in light of this grave injustice being of unmistakable clarity. WIP has further chosen to take a path

of arbitrary discrimination which can not be justified by any attempt of explanation. This being WIP's decision to deny coverage to any corporation in which Mr. Eisenberg happens to hold a majority interest. This is a most outrageous manner for a state created plan to protect the public interest. Such a decision by WIP ignores the fact that many such corporations now or in the future, will be devoid of any type of poor past-loss record. WIP was formulated because of the recognition that "the public interest demands a constant and assured source of protection." Id at 527. WIP is required by law to have procedures for its applicants and participants to have grievances reviewed. Wis.Stat.Ann § 619.17(3)(West 1977 Supp.).

Public policy demands that Petitioner be granted justice since he was conspired against because of exercising his right to make known his grievances, and since the adjudication of this case has been a mockery of justice. The abhorant result in the

instant case, is precisely the type which truly deserves and demands constitutional protection for Petitioner if our country is to remain a free democracy.

VII. WHAT SHOULD BE DONE

It would appear only logical that the Court should:

(1) Order an investigation of the Wisconsin Insurance Plan operation, or recommend that the Legislature do so.

(2) Order the policy involved to be reinstated.

(3) Order that WIP pay the cost of this proceeding and any other damages emanating from the cancellation. It was expensive.

(4) Refer to the Attorney General of the State of Wisconsin for analysis and consideration of a conspiracy and testimony practiced by the WIP proponents.

(5) Refer to appropriate federal authorities for consideration of evidence of discrimination because of the fact that WIP is the recipient of federal funding.

(6) Summarily order the WIP Governing Board to cease and desist from fulfilling its wrongful, illegal vote barring the issuance of policies to Appellant, Sydney M. Eisenberg and associated corporations.

(7) Order WIP suspended from operating in the State of Wisconsin because of the nefarious activities and methods practiced by WIP as delineated in the records of the instant case, until it promulgates and proposes a plan to re-open.

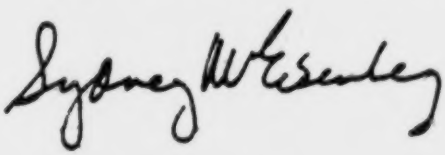
(8) Order the Insurance Commissioner to check the handling of WIP insurance claims to find out how many others have been deprived of prompt settlements and consequently, suffered damages with properties left to become derelict and causing insult to the entire community.

(9) There is no legal authority for the imposition of high court costs against Appellant. In an agency appeal of a policy cancellation there is no authority for the reviewing judge to assess costs against Appellant.

CONCLUSION

For the reasons set forth above Petitioner respectfully requests this Court to reverse the ruling of the Milwaukee County Circuit Court and of the Wisconsin State Supreme Court.

Respectfully submitted,



SYDNEY M. EISENBERG
Attorney for Plaintiff-
Appellant

P.O. ADDRESS:

1131 West State Street
Milwaukee, Wisconsin 53233
414/271-0931

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STATE OF WISCONSIN : CIRCUIT COURT : MILWAUKEE COUNTY
BRANCH 32

KNAPP ST. REALTY CORP.,
Plaintiff,

Case No. 547-508

vs.

WIS. INS. PLAN, ET AL,
Defendents

NATURE OF PROCEEDINGS

This is an action by a petitioner for judicial review under Wis. Stats. Section 227.15,.16(1977), of a decision by the Office of the Commissioner of Insurance dated March 4, 1981. The above decision adopts the proposed findings of fact, conclusions of law, and proposed decision rendered by the Hearing Examiner on December 22, 1980, affirming the cancellation of petitioner's insurance coverage by the Governing Committee of the Wisconsin Insurance Plan.

FACTS

Petitioner, a Wisconsin corporation, in which Sydney M. Eisenberg owns an interest, insured its property at 300-18 W. Juneau Avenue, Milwaukee, Wisconsin, through the respondent, the Wisconsin Insurance Plan (hereafter known as WIP). WIP is a nonprofit, unincorporated facility authorized by

Wis. Stats. Cap. 619(1977), and established by the Wisconsin Administrative Code, Ins. Sec. 4.10 (1976), to provide for the issuance of property insurance for risk sharing, and to assist applicants in securing basic property insurance.

On Octuber 31, 1976, a fire occurred at the named property. Petitioner filed a claim under its WIP policy. R.J. Meyers of the General Adjustment Bureau inspected the urned premises for WIP and upon his adjustment, petitioner received a loss payment from the respondent in the amount of $57,000.

On September 1, 1978, a second fire occurred. Inspections made of the property after the fire by Meyers and jointly with petitioner's independent adjuster, Alexander Sill and Associates of Chicago, disclosed that a substantial amount of damage caused by the October 31, 1976 fire remained unrepaired.

WIP had adopted underwriting standard which included a prohibition against insuring properties that had unrepaired damage from prior fires because of difficulty in determining damage in the

event of a second loss.

By notice of cancellation or nonrenewal dated February 7, 1979, a letter of the same date and a follow-up letter of February 19, 1979, petitioner was advised its insurance covering the above-mentioned property was being cancelled.

The petitioner appealed to the WIP Governing Committee. At its meeting of March 15, 1979, the committee denied the appeal.

The petitioner appealed the action of the WIP governing Committee to the Commissioner of Insurance and requested a hearing. A Hearing Examiner, Walter J. Cole, was appointed by the Commissioner to preside at a hearing in her behalf. A pre-hearing on August 30, August 31, September 21, and October 8, 1979. After the hearings, the Hearing Examiner on December 22, 1980, submitted his proposed findings of fact, conclusions of law, and a proposed decision to the Commissioner.

Susan Mitchell, Commissioner of Insurance, issued her decision on March 4, 1981, adopting the proposed findings of fact, conclusions of law, and proposed decision of the Hearing Examiner and

ordering the decision of the Governing Committee of the WIP be affirmed and the petitioner's appeal dismissed.

Petitioner appeals the decision of the Commissioner to this Court.

ISSUE

Is there "substantial evidence" to support the finding by the Commissioner of Insurance of unrepaired damage to petitioner's property from the October 31, 1976 fire?

DECISION

The judicial review of administrative agency decisions by this court is authorized by Wis. Stats. Section 227.15(1977) and is limited by Wis. Stats. Section 227.20(1977). Wis. Stats. Section 227.20 (6) requires:

> "If the agency's action depends on any fact found by the agency in a contested case proceeding, the Court shall not substitute its judgment for that of the agency as to the weight of the evidence on any disputed finding of fact. The court shall, however, set aside agency action or remand the case to the agency if it finds that the agency's action depends on any finding of fact that is not supported by substantial evidence in the record."

The reviewing courts determine only whether substantial evidence in the record supports the agencie's decision. Seebach v. Public Service Commission, 97 Wis. 2d 712, 718, 295 N.W. 2d 753 (1979). The substantial evidence test is whether reasonable minds could arrive at the same conclusion as the agency. Wisconsin Environmental Decade v. Public Service Commission, 98 Wis. 2d 682, 693-94, 298 N.W. 2d 205 (1980); Sanitary Transfer & Landfill, Inc. v. DNR, 85 Wis. 2d 1, 14, 270 N.W. 2d 144 (1978). However, the standard of substantial evidence to support administrative agancy's findings of fact does not permit this court to overturn the agency's finding even if it be against the great weight and clear preponderance of the evidence. Holtz v. Krause, Inc. v. DNR, 85 Wis. 2d 198, 204, 270 N.W. 2d 409 (1978). The test of substantial evidence is one of reasonableness, not of a standard of degree of proof.

R.J. Meyers of the General Adjustment Bureau, employed by WIP as their adjuster of claims, inspected the property after each fire. He repeatedly testified to the existence of unrepaired damage

from the October 31, 1976 fire upon inspection of the petitioner's property immediately after the September 1, 1978 fire. Transcript, August 31, 1979 at 350-51; Transcript, September 21, 1979 at 190. When asked specifically about the unrepaired damage, Meyer responded:

> "I observed areas where the fire had spread from the previous fire that had not yet been repaired, hallways on the fourth floor were very heavily smoke-damaged. That did not appear to have been redecorated since the first fire. We talked to the man that I mentioned that was there from downstairs, he said that those areas had not been cleaned." Transcript, September 21,1979, at 191-92.

> "We observed areas of the roof structure that would be rafters and the roof sheathing in areas that were also charred. This would be over the fourth floor that were damaged by the previous fire." Transcript, supra, at 193.

> "More areas of, say, decorating or floor tile that appeared to have been damaged from the previous fire." Transcript, supra.

Petitioner's brief relies heavily on a letter dated May 22, 1979, written by Meyer to Kenneth Kenny, indicating substantial repair of the property since January 26, 1979. However, this repair work occurred after the cancellation of petitioner's insurance coverage. Also, Meyer testified that even after the inspection of the

premises on May 22, 1979, damage from the fire of October 31, 1976, still remained unrepaired. Transcript, September 21, 1979, at 214-16; Transcript October 8, 1979 at 43.

Mr. Gary Tanner, an adjuster with the Alexander Sill Company, employed by petitioner to represent its interest in the adjustment of fire damage, testifies he found previous fire damage on his inspection of the premises on September 22, 1978. Transcript, August 30, 1979, at 131.

Mrs. Jean Bogie, Claim Supervisor for WIP, inspected the property on January 26, 1979. She testified to the existence of substantial unrepaired damage from the fire of October 31, 1976. Transcript, August 30, 1979, at 179. Although Mrs. Bogie apparently had not been in the building before that date, the WIP file of the October 31, 1976 fire served as a reference. Transcript, August 31, 1979, at 297. According to Mr. Bogie, water damage, charring to the timbers in the roof, and smoke damage, still remained unrepaired from the first fire. Transcript, suprs at 298.

It is apparent the testimony of Meryers, Tanner and Bogie satisfies the substantial evidence test

in that reasonalbe men could find unrepaired fire damage from October 31, 1976. In reviewing agency decisions, this court does not independently weight the evidence or pass on the creditability of a witness. Chicago & Northwestern Railroad v. Labor & Industry Review Commission, 91 Wis. 2d 463, 468, 283 N.W. 2d 603 (1979): Holtz & Krause v. DRN, 85 Wis. 2d 198, 204, 270 N.W. 2d 409 (1978). Although the substantial evidence test requires reasonableness of proof rather than weight or degree of proof, it seems the standard of proof (preponderance of evidence) is, nevertheless, met.

Wis. Stats. Section 631.36(2)(2) provides:

> (2) Midterm Cancellation. (a) Permissible grounds. Except as provided by par. (c), no insurance policy may be cancelled by the insurer prior to the expiration of the agreed term or one year from the effective date of the policy or renewal, whichever is less, except for failure to pay a premium when due or on grounds stated in the policy, which must be comprehended within one of the following classes:
> 1. Material misrepresentation.
> 2. Substantial change in the risk assumed, except to the extent that the insurer should reasonbly have foreseen the change or contemplated the risk in writing the contract;
> 3. Substantial breaches of contractual duties, conditions or warranties; or
> 4. Attainment of the age specified as the terminal age for coverage, in which case the insurer may cancel by notice under

par. (b) accompanied by a tender of a proportional return of premium.

Given the substantial unrepaired damage from the fire of October 31, 1976, the Commissioner found the resulting change in the risk of insuring the petitioner's property assumed by the respondent was within the contemplation of Wis. Stats. Section 631.36 (2)(2)(2). It "is difficult to differentiate between the first fire and the second fire, what was previously damaged, and when you get into overlapping areas, it becomes practically impossible to make a fair assessment of the damages." Transcript, October 8, at 46.

Although this court is not bound by the interpretation given to a statute by administrative agencies, the construction and interpretation of a statute adopted by the administrative agency charged with the duty of applying the law is entitled to great weight. Milwaukee v. WERC, 71 Wis. 2d 709, 714 239 N.W. 2d 63 (1976). This court agrees with the Commissioner's interpretation.

Wis. Adm. Code, Sec. Ins. 4.10(11)(a)(3) provides:

3. That the risk is not acceptable because it fails to meet reasonable underwriting standards specified in the action report. Reasonable underwriting standards shall

not include neighborhood or area location or any environment hazard beyond the control of the property owner. They may include but are not limited to the following:

(a) Serious defects in the physical condition of the property, such as its construction, heating, wiring, evidence of previous loss, general deterioration or lack of protective measures: (emphasis added)

Wis. Adm. Code, Sec. Ins. 4.10(15)(b) states:

(b) No servicing company shall cancel or refuse to renew a policy issued under this Plan except for:

1. Facts as confirmed by inspection which would have been grounds for non-acceptance of the risk under the Plan had they been known to the Plan at the time of acceptance; or
2. Changes in the physical condition of the property or other changed conditions as confirmed by inspection or investigation that make the risk uninsurable under the Plan rules.

The commissioner apparently found the unrepaired fire damage created a risk unacceptable to and uninsurable by the Plan, leaving affirmation of the cancellation of petitioner's policy the only course of action.

Considering the finding of unrepaired damage from the fire of October 31, 1976, coupled with the

above-mentioned statutes and codes, the Governing Committee of the Wisconsin Insurance Plan acted correctly in cancelling petitioner's insurance policy.

Based on the above, the Court affirms the decision of the Commissioner in all respects.

The respondent shall prepare an order consistent with this decision and submit it to the court for signature in accordance with the Rules of the Circuit Court of the First Judicial District.

Dated this 18th day of June, 1982, at Milwaukee, Wisconsin.

BY THE COURT:

/s/ Michael D. Guolee
Michael D. Guolee
Circuit Court Judge
Branch 32

STATE OF WISCONSIN : CIRCUIT COURT : MILWAUKEE COUNTY

KNAPP STREET REALTY CORPORATION,
Plaintiff,

Case No. 547-508

v.

J U D G M E N T

WISCONSIN INSURANCE PLAN and
OFFICE OF THE COMMISSION OF
INSURANCE,
Defendant,

The Petition of Knapp Street Realty Corporation for judicial review under §227.15 and §227.16 of the Wisconsin Statutes of 1977, of a Decision of the Wisconsin Commisioner of Insurance dates March 4, 1981, having come on for determination by the HONORABLE MICHAEL D. GUOLEE, upon the records, files, and transcript of proceedings had before the Wisconsin Commisioner of Insurance; and, under date of July 14, 1982, the Court having entered its order affirming the aforesaid Decision of the Wisconsin Commissioner of Insurance,

NOW, on motion of Kenney, Krembs & Fellows, attorneys for the Defendant, Wisconsin Insurance Plan,

IT IS ADJUDGED that the Decision of the Wisconsin Commissioner of Insurance affirming and ap-

proving the action taken by the Governing Committee of the Wisconsin Insurance Plan, which effect cancellation of Plaintiff's insurance coverage under the Wisconsin Insurance Plan, be, and the same is hereby, affirmed in all respects,

IT IS FURTHER ADJUDCED that the Defendant, Wisconsin Insurance Plan, have and recover from the Plaintiff, Knapp Street Realty Corporation, the sum of $1,406.00, being its costs and disbursements as taxed herein.

Dated this 5th day of October, 1982.

BY THE COURT,

FRANCIS X. McCORMACK, Clerk

By: /s/ Marvin J. Kopitzke
Deputy Clerk

Judgment docketed this 12th day of October, 1982, at 8:07 o'clock A.M.

FRANCIS X, McCORMACK, Clerk

By: /s/ Marvin J. Kopitzke
Deputy Clerk

DISTRICT I

OFFICE OF THE CLERK

COURT OF APPEALS

OF WISCONSIN

Marily L. Graves

Clerk

Madison, November 7, 1983

M.L. Eisenberg
M.L. Eisenberg
& Associates
1131 W. State
Street
Milwaukee,WI 53233

Richard E. Schmidt
Kenney, Krembs & Fellows
622 N. Water Street
Milwaukee, WI 53202

TO:

James P. Altman
Asst.Attorney
General

Hon. Michael D. Guolee
901 N. Ninth Street
Milwaukee,WI 53233

(L.C. #547-508)

You are hereby notified that the Court entered the following opinion and order:

82-1968 Knapp Street Realty Corporation v. Wisconsin Insurance Plan and Office of the Commissioner of Insurance

Before Wedemeyer, P.J., Decker and Moser, JJ.

The repsondents, Wisconsin Insurance Plan (WIP) and the Office of the Commissioner of Insurance, have moved to strike the appellant's amended brief and to dismiss this appeal on the ground that the amended brief does not comply with the requirments of Rule 809.19, Stats. The Appellant's original brief was struck by this court on May 17, 1983, on the ground that it did not identify the issues on appeal, the disposition of those issues by the Commissioner of Insurance, the standard of review or the applicable statutory or case law. We conclude that the appellant's amended brief must also be stricken. In addition, since the appellant has now had an opportunity to file two briefs and since neither brief satisfactorily complies

with the requirements of Rule 809.19(1), its appeal is dismissed pursuant to Rule 809.83(2), Stats.

As noted by the respondents, the appellant's amended brief contains approximately twenty-nine pages which are identical to pages contained in its original brief. The amended brief contains an additional three pages setting forth twenty-four issues on appeal, including one issue with seven subsections. It also contains new sections entitled "Issues as Decided by the Commission of Insurance and the Circuit Court" and "Standard of Proof Required." An examination of the contents of these sections reveals that they do not rectify the problems which caused us to strike the first brief.

The record reveals that this appeal is from a circuit court judgment which affirmed a decision of the Commissioner of Insurance affirming a decision of the governing committee of WIP which cancelled an insurance policy on

property owned by the appellant at 300-318 West Juneau Avenue, Milwaukee. All of the issues raised by the appellant in its amended brief are either irrelevant to this appeal or are so inadequately presented as to make a responsive brief impossible. Specifically, in issue No. 9, the appellant raises the question of whether WIP violated the anti-trust laws. However, it fails to cite any legal authority to prove that such a violation occurred and fails to demonstrate that this alleged violation renders the cancellation improper. Issue 10 ask whether WIP was "so bent on revenge that it notified all future insurers that the building was not insurable." However, since the appellant's inability to obtain insurance from an alternative source is not material to the issue of whether WIP was entitled to cancel the policy it had issued on the property at 300-318 West Juneau Avenue, issue 10 must be disregarded.

Issue 11 deals with the question of whether the original notice of cancellation issued by WIP was illegal, causing it to issue a second notice of cancellation twelve days later which added a paragraph setting forth the appellant's appeal rights. Since the appellant's brief fails to set forth legal authority or argument which demonstrates that WIP's supplementation of its notice of cancellation prejudiced the appellant or otherwise rendered the commissioner's decision or the judgment of the circuit court improper, this issue must also be disregarded.

Issues 12, 15, 16, 18, and 19 present requests for investigations of WIP's operations by the Wisconsin attorney general's office, the legislature, the "appropriate federal authorities," and the Commissioner of Insurance. These issues are extraneous to this appeal, which deals only with the propriety of the circuit court's judgment affirming the cancellation of insurance coverage for the property at 300-318 West

Juneau Avenue and does not entitle the appellant to an investigation of WIP's general operations. Similarly, issue 17 is outside the purview of this appeal. This review of the cancellation of coverage on the property at 300-318 West Juneau Avenue simply does not entitle the appellant to challenge WIP's decision to refuse to sell new policies to the appellant or Sidney Eisenberg and to refuse to renew exising policies held by them.

Issues 20, 21, and 22 raise questions regarding the trial court's authority to assess costs against the appellant. However, since these contentions are not addressed elsewhere in the appellant's brief except in the form of conclusory statements at pages 11 and 49, they cannot be deemed to be properly presented under Rules 809.19(1)(e), Stats. Similarly, issue 23, which is discussed only at page 50 of the appellant's brief, must be disregarded. Since the appeal in this case is from a judgment adverse to Knapp

Street Realty Corp., its brief cannot be used to raise the claim that Sidney Eisenberg was denied the opportunity to defend himself.

In issue 24 the appellant asks why the notice of cancellation did not "specify specifically what was wrong and what had to be repaired to reinstate the policy." However, in its brief it presents no legal authority or argument as required by Rules 809.19(1)(e), Stats., to demonstrate that WIP was obligated to tell it how the policy could be reinstated. Since its brief also fails to set forth any legal authority or argument to support the proposition that the notice of cancellation was not sufficiently specific, issue 24 must be disregarded.

The remaining issues presented by the appellant fail to redeem its amended brief. Issue No. 2 asks whether the building at 300-318 West Juneau Avenue was insurable. Since the notice of cancellation and the decision of the Commissioner state that the policy was cancelled

because of previous unrepaired damage constituting a change of circumstances within the meaning of sec. 631.36(2)(a) 2, Stats., the issue of whether the building was insurable does not appear to be relevant to this appeal. Since the appellant's brief fails to demonstrate that the issue is relevant in any manner, it cannot be deemed properly presented under Rules 809.19(1)(b) and (e), Stats.

Issues 1, 2, and 4 raise the question of whether the appellant's policy was cancelled as a result of a conspiracy by employees and directors of WIP, misconduct by WIP's manager, or in retaliation for complaints filed by the appellant against WIP with the legislature, the governor's office, and the office of the Commissioner of Insurance. Issues 5, 6, and 7 discuss the evidence which supports a first fire at 300-318 West Juneau Avenue. However, while evidence presented at the hearing regarding repairs made by the appellant and previous complaints filed

it are discussed in the appellant's brief, this evidence is never placed in the context of a coherent legal argument. The appellant never sets forth the standard of review to be applied by this court in reviewing the trial court's decision and never sets forth a discussion of the legal authority or principles which it believes warrant a reversal of the trial courts' judgment. Although the brief quotes a large number of cases dealing with civil actions based on conspiracy, it never shows how these cases are relevant to a review of an administrative agency decision. Consequently, the appellant fails to satisfy the requirements of Rule 809.19(1)(e) in regard to issues 1, 3, 4, 5, 6, and 7. Moreover, while the appellant refers to the trial court's memorandum decision discussing the evidence and has incorporated this decision in its appendix, the decision cannot be considered by this court because it was never made part of the record on appeal pursuant to Rule.

WISCONSIN INSURANCE PLAN

MINUTES OF QUARTERLY MEETING OF THE GOVERNING COMMITTEE

MAY 31, 1979

OFFICES OF THE NORTHWESTERN NATIONAL INSURANCE COMPANY

Milwaukee, Wisconsin

The following were present:

Alliance of American Insurers:	P.J. McGinley
American Insurance Association:	The St. Paul Companies, G. Robert Perry
National Assoc. of Independent Insurers:	Home Mutual Insurance Co., R.J. Verdoorn
Wisconsin Insurance Alliance:	American Family Mutual Ins. Co., E.Halvorson Milwaukee Insurance,J.R. Fox Northwestern National Insurance Co., M.W. Abraham West Bend Mutual Insurance Co., J.R. Dedrick
All Other Insurers:	State Farm Fire & Casualty Co., T.J. McClellan
IIA Of Wisconsin:	Sanford Carter, Carter-Moody & Associates
PIA of Wis.,Inc:	R.E. Engler*, Engler Ins. Agency
Public Members:	Al Luzi*, Clifton Momon, William Perkins*, Dorothy Schmidt
Wisconsin Insurance Department:	N.J. Wirtz
Wisconsin Insurance Plan Staff:	F.J. Schwoegler, R.E. Steinbach

*Present for part of the meeting.

The meeting was called to order at 10:30 a.m. by Chairman Verdoorn who stated that compliance had been made with the Open Meeting Law and notice was publicized to all interested parties... .

FEDERAL RIOT REINSURANCE

This subcommittee met May 25 in the offices of the American Family Mutual Insurance Company in Madison. The subcommittee reviewed the evolution of the Plan and discussed the specific goal that the subcommittee was to accomplish. The subcommittee concluded that the Plan cannot "divest" itself of federal control, but that upon being given appropriate direction by the Governing Committee, this subcommittee could seek to have other interests make the necessary changes in laws, etc. The Plan could cease to come under federal control only by an action by HUD, which might be precipitated by failure of the Plan to comply with federal directives. The subcommittee advised that they would monitor the June NAIC meeting in Chicago in order to obtain further input on the situation. It was noted that a recent NAIC central office report was critical of the riot reinsurance program, and that federal monies in responding to insured riot losses had proven to be very secondary to those provided by the individual states.

There was further discussion relative to the specific purpose of the subcommittee, during which it was noted that relatively few companies are presently purchasing riot reinsurance, but that each company could be construed as having made its statment on the subject by its decision whether or not to purchase such reinsurance. Substantial further discussion ensued, with the consensus emerging that the charge of the subcommittee was to "investigate and analyze" all available information on both sides of the issue of federal control and availability of riot reinsurance, and to present the results of their investigation to the full Board for a decision on the future course to be followed.

KNAPP STREET REALTY COMPANY APPEAL TO INSURANCE COMMISSIONER

The Manager informed the Committee of the status of this appeal, and distributed information relative to the loss history of the insured. He advised that Mr. Eisenberg's request for another inspection of the premises in question had been approved. While Mr. Eisenberg comtends that the issue is whether the premises are insurable; the Plan firmly contends the only issue to be whether the cancellation was valid.

After further discussion it was decided that the hearing and any further actions that may be called for on the basis of past loss history are separate and distinct issues. After considerable discussion it was moved, seconded and carried unanimously that the Manager be instructed to take immediate steps to decline renewal of all of Mr. Eisenberg's accounts with the Plan -- in a manner to be decided upon between the Manager and counsel, and consistent with the procedures of the Plan -- in that Mr. Eisenberg, as an individual, a partner, or a major corporate stockholder, is no longer insurable on the basis of his past loss record.....

The meeting was adjourned at 1:25 p.m.

Respectfully submitted,

F. J. Schwoegler
Secretary

OFFICE OF THE COMMISSIONER OF INSURANCE
STATE OF WISCONSIN

In the Matter of the Appeal of
Knapp Street Realty Corporation
from the cancellation of an insurance policy by Wisconsin Insurance Plan

DECISION

Before the Honorable Susan Mitchell
Commissioner of Insurance

DECISION

On reading the Proposed Findings of Fact, Conclusions of Law and the Decision of the Hearing Examiner herein, and having considered the briefs and arguments of the parties, and being advised in the premises:

I hereby adopt the attached Findings of Fact, Conclusions of Law and the Proposed Decision of the Hearing Examiner herein, and thereafter

It is ordered that the decision of the Governing Committee herein be and the same hereby is affirmed and appellant's appeal is dismissed.

Dated at Madison, Wisconsin, this 4th day of March, 1981.

Susan Mitchell
Commissioner of Insurance

OFFICE OF THE COMMISSIONER OF INSURANCE
STATE OF WISCONSIN

- -

In the Matter of the Appeal of Knapp Street Realty Corporation from the cancellation of an insurance policy by Wisconsin Insurance Plan

DECISION

- -

Before the Honorable Susan Mitchell
Commissioner of Insurance

DECISION

On reading the Proposed Findings of Fact, Conclusions of Law and the Decision of the Hearing Examiner herein, and having considered the briefs and arguments of the parties, and being advised in the premises:

I hereby adopt the attached Findings of Fact, Conclusions of Law and the Proposed Decision of the Hearing Examiner herein, and thereafter

It is ordered that the decision of the Governing Committee herein be and the same hereby is affirmed and appellant's appeal is dismissed.

Dated at Madison, Wisconsin, this 4th day of March, 1981.

/s/
Susan Mitchell
Commissioner of Insurance

Office of the Commission of Insurance
State of Wisconsin

In the Matter of the Appeal of
Knapp Street Realty Corporation
from the cancellation of an
insurance policy by Wisconsin
Insurance Plan

Proposed Findings
of Fact
Conclusion of Law
and Decision

Before the Honorable Susan Mitchell
Commissioner of Insurance

Hearing Examiner: Walter J. Cole
123 West Washington Avenue
Madison, WI 53702

Appearances:

Sydney M. Eisenberg
1131 West State Street
Milwaukee, WI 53233
for Appellant, Knapp
Street Realty Corporation

Kenney, Krems & Fellows
Attorney at Law
622 North Water Street
Milwaukee, WI 53203
by Kenneth M. Kenney
for Appellee, Wisconsin
Insurance Plan

FINDINGS OF FACT (Proposed)

1) Appellant, a Wisconsin Corporation, in which Sydney M. Eisenberg owns an interest, insured its property at 300-318 West Juneau Avenue, Milwaukee, Wisconsin, in the Wisconsin Insurance Plan (WIP).

2) WIP is a nonprofit, unincorporated facility authorized by Chapter 619, Stats., and established by Wisconsin Administrative Code section Ins 4.10 to provide for the issuance of basic property insurance.

3) By a Notice of Cancellation or Nonrenewal dated February 7, 1979, a letter of the same date and a follow-up letter of February 19, 1979, Appellant was advised its insurance policy covering the above identified property was being cancelled.

4) Appellant appealed to the WIP Governing Committee. At its meeting of March 15, 1979, the committee denied the appeal.

5) Appellant on March 19, 1979 appealed from the action of the WIP Governing Committee to the Commissioner of Insurance, requesting a hearing.

6) A pre-hearing conference was held herein on May 21, 1979 and evidentiary hearings on August 30, August 31, September 21 and October 8, 1979.

7) The record attached to this document is certified to the Commissioner. The transcript of the testimony taken August 30 and August 31 contains some errors of omission and some mistakes but is substantially accurate and sufficiently so

that the outcome herein is not affected thereby.

8) The cancellation noted in paragraph 3) herein followed fires on October 31, 1976 and September 1, 1978 in appellant's property identified in paragraph 1) herein.

9) Inspections made of the property after the 9/1/78 fire, in behalf of WIP and jointly with an independent adjuster employed by appellant, disclosed that a substantial amount of damage caused by the October 31, 1976 fire remained unrepaired.

10) Including $23,750 paid appellant herein by WIP because of the September 1, 1978 fire and $57,000 because of the October 31, 1978 fire, WIP had paid, between 1972 and February 9, 1979, on 10 claims for damaged property in which Sydney M. Eisenber had an interest, $178,752.90. WIP had an open claim for an additional loss on November 23, 1978, carried at $5,400.

11) As of February 15, 1979, appellant insured the said premises against loss reason of fire, vandalism and malicious mischief with extended coverage through a licensed Wisconsin insurance agent with a limit of liability of $63,000 on buildings and $2,000 on contents, both subject to 80%

co-insurance. The policy term was February 5, 1979 to February 15, 1980.

12) Prior to September 1, 1978 WIP had adopted underwriting standards which included a prohibition against insuring properties that had unrepaired prior damage because of difficulty in determining damage in the event of a second loss.

13) The unrepaired damage attributable to the October 31, 1976 fire made the structure more flammable and susceptible to future fires.

CONCLUSION OF LAW (Proposed)

14) At all times material herein s. 631.36 (2) (a) & (b) provided as follows:

"(2) Midterm Cancellation. (a) Permissible grounds by par. (c), no insurance policy may be canceled by the insurer prior to the expiration of the agreed term or one year from the effective date of the policy or renewal, whichever is less, except for failure to pay a premium when due or on grounds stated in the policy, which must be comprehended within one of the following classes.

"1. Material misrepresentation;

"2. Substantial change in the risk assum d, except to the extent that the insurer should reasonable have foreseen the change or contemplated the risk in writing the contract;

"3. Substantial breaches of contractual duties, conditions or warranties; or

"4. Attainment of the age specified as the terminal age for coverage, in which case the insurer may cancel by notice under par. (b) accompained by a tender of a proportional return of premium.

"(b) Notice. No cancellation under par. (a) is effective until at least 10 days after the 1st class mailing or delivery of a written notice to the policyholder."

15) The finding of paragraph 9) constituted a substantial change in the risk assumed within the contemplation of s. 631.36 (2) (a) 2., stats.

16) At all times material herein Wis. Adm. Code section Ins 4.10 (15) (b) 1. & 2. provided as follows:

"(b) No servicing company shall cancel or refuse to renew a policy issued under this Plan except for:

"1. Facts as confirmed by inspection which would have been grounds for nonacceptance of the risk under the Plan had they been known to the Plan at the time of acceptance; or

"2. Changes in the physical conditions of the property or other changed conditions as confirmed by inspection or investigation that make the risk uninsurable under the Plan rules; or".

17) At all times material herein Wis. Adm. Code section Ins 4.10 (11) (a) 3. and d. provided as follows:

"3. That the risk is not acceptable because it fails to meet reasonable underwriting standards specified in the action report. Reasonable underwriting standards shall not include neighborhood or area location or any environmental hazard be-

yond the control of the property owner. They may include but are not limited to the following:

"(a) Serious defects in the physical condition of the property, such as its construction, heating, wiring, evidence of previous losses, general deterioration or lack of protective measures;"

...

"d. Previous loss history or matters of public record concerning the applicant."

18) The rules set forth in paragraphs 16) and 17) apply to the findings herein set forth in paragraphs 9), 10), 12) and 13).

19) At all times material herein a. 619.01 (1) (a) & (b), Stats. provided as follows:

"619.01 Mandatory risk sharing plans. (1) MANDATORY PLANS. (a) Establishment of plans. If the commissioner finds after hearing that in any part of this state automobile insurance, property insurance, health care liability insurance, municipal liability insurance or worker's compensation insurance is not readily availble in the voluntary market, and that the public interest requires such availability, the commissioner may by rule either promulgate plans to provide such insurance coverages for any risks in this state which are equitably entitled to but otherwise unable to obtain such coverage, or may call upon the insurance industry to prepare plans for the commissioner's approval.

"(b) Purposes and contents of risk sharing plans. The plan promulgated or prepared under par. (a) shall:

"1. Give consideration to the need for adequate and readily accessible coverage, to alternative methods of improving the market affected, to the preferences of the insurers and agents, to the inherent limitations

of the insurance mechanism, to the need for reasonalbe underwriting standards, and to the requirement of reasonable loss prevention measures;

"2. Establish procedures that will create minimum interference with the voluntary market;

"3. Spread the burden imposed by the facility equitably and efficiently within the industry; and

"4. Establish procedures for applicants and participants to have grievances reviewed by an impartial body."

20) At all times material herein Wis. Adm. Code section Ins 4.10 (19) provided as follows:

"(19) Right of Appeal. Any affected person may appeal to the governing committee within 30 days after any final ruling, action, or decision of the Plan. The governing committee must consider the appeal and render a decision promptly after receipt of any such appeal. Any decision of the governing committee may be further appealed to the commissioner within 30 days. Orders of the commissioner shall be subject to judicial review."

21) Addpllants' appeal to the Governing Committee and from its adverse ruling to the Commissioner of Insurance was in compliance with the provision set forth in paragraphs 19) and 20) herein.

22) The decision of the Governing Committee should be affirmed.

DECISION (Proposed)

It is hereby ordered that the decision of the Governing Committee herein be and the same hereby is af-

firmed and appellant's appeal is dismissed.

Dated at Madison, Wisconsin, this 22nd day of December, 1980.

/s/

Walter J. Cole
Hearing Examiner

OFFICE OF THE CLERK

SUPREME COURT

STATE OF WISCONSIN

Hon. Michael D. Guolee

Circuit Court for Milwaukee County

Br. 32, Milwaukee County Courthouse, Rm. 615

Milwaukee, Wisconsin 53233

Madison, February 7, 1984

M.L. Eisenberg
M.L. Eisenberg & Associates

James P. Altman
Asst. Attorney General

TO: 1131 West State Street.

Milwaukee, WI 53233

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Milwaukee, WI 53202

The Court today announced an order in your case as follows:

No. 82-1968 Knapp Street Realty Corp. v. Wisconsin Insurance Plan, et at.

A petition for review pursuant to sec. 808.10, Stats., having been filed on behalf of plaintiff-appellant-petitioner Knapp Street Realty Corporation, and considered by the court, together with a motion of the Office of the Commissioner of Insurance and the Wisconsin Insurance Plan, defendants-respondents, to strike the petition for review.

IT IS ORDERED that the motion to strike is denied, without costs; and

IT IS FURTHER ORDERED that the petition for review is denied, with $50 costs.

7th day of February AD 1984

Clerk of the Supreme Court
of the State of Wisconsin

HEFFERNAN, C.J., did not participate.

Marilyn L. Graves
Clerk of Supreme Court.

WISCONSIN STATUTES CITED

619.01 Mandatory Risk Sharing Plans

(1) Mandatory plans. (a) Establishment of plans. If the commissioner finds after a hearing that in any part of this state automobile insurance, property insurance, health care liability insurance, municipal liability insurance or worker's compensation insurance is not readily available in the voluntary market, and that the public interest requires such availability, the commissioner may by rule either promulgate plans to provide such insurance coverages for any risks in this state which are equitably entitled to but otherwise unable to obtain such coverage, or may call upon the insurance industry to prepare plans for the commissioner's approval.

636.10 Timely Payment of Claims

(1) Unless otherwise provided by law, an insurer shall promptly pay every insurance claim. A claim shall be overdue if not paid within 30 dyas after the insurer is furnihsed written notice of

the fact of a covered loss and of the amount of the loss. If such written notice is not furnished to the insurer as to the entire claim, any partial amount supported by written notice is overdue if not paid within 30 days after such written notice is furnished to the insurer. Any part of all of the remainder of the claim that is subsequently supported by written notice is overdue if not paid within 30 days after written notice is furnished to the insurer. Any payment shall not be deemed overdue when the insurer has reasonable proof to establish that the insurer is not responsible for payment, notwithstanding that written notice has been furnished to the insurer. For the purpose of calculating the extent to which any claim is overdue, payment shall be treated as being made on the date of draft or other valid instrument which is equivalent to payment was placed in the U.S. mail in a properly addressed, postpaid envelope, or if not so posted, on the date of delivery. All overdue payments

shall bear simple interest at the rate of 12% per annum.

(2) Notwithstanding sub. (1), the payment of a claim shall not be overdue until 30 days after the insurer receives the proof of loss required under the policy or equivalent evidence of such loss. The payment of a claim shall not be overdue during any period in which the insurer is unable to pay such claim because there is no recipient who is legally able to give a valid release for such payment, or in which the insurer is unable to determine who is entitled to receive such payment, if the insurer has promptly notified the claimant of such inability and has offered in good faith to promptly pay said claim upon determination of who is entitled to receive such payment.

(3) This section applies only to the classes of claims enumerated in s. 646.11(2).

646.11 Eligible Claims

(2) Classes of Claims to be Paid. A claim shall not be paid unles it is:

(a) Residents. The claim of a policyholder or an insured of, or a beneficiary under, a policy or annunity, who at the time of the insured event or of the liquidation order was a resident of this state; or

(b) Owners of property interests. The claim of a person having an insurable interest in or related property which was situated in this state at the time of the insured event; or

(c) Third party claimants. A claim under a liability or worker's compensation insurance policy, if:

1. Either the insured or the 3rd party claimant was a resident of this state at the time of the insured event; or

2. The claim is for bodily or personal injuries suffered in this state or by a person who when suffering the injuries was a resident of this state;

646.11 - Continued

or

3. The claim is for damage to property situated in this state at the time of damage.

(d) Assignees. The claim of a direct or indirect assignee of a person who except for the assignment might have claimed under par. (a) or (b).

905.03(2)

General rule of privilage: A client has the privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purpose of facilitating the rendition of professional legal services to the client.

619.17 Contents of plan:

The plan shall include but is not limited to, the following: ...

(3) Procedures for applicants and participants to have grievances reviewed by an impartial body.

U.S. CONSTITUTIONAL PROVISIONS AND STATUTES:

42 U.S.C.A. § 1983: Civil Action for Deprivation of Rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other persons within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

(3) If two or more persons in any State or Territory conspire or go in disguise on the highway or on the premises of another, for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws; or for the purpose of preventing or hindering the constituted authorities of any State or Territory from giving or securing to all persons within such State or Territory the equal protection of the laws, or if two or more persons conspire to prevent by force, intimidation , or threat, any citizen who is lawfully entitled to vote, from giving his support or advocacy in a legal manner, toward or in favor of the election of any lawfully qualified person as an elector for President or Vice President, or as a Member of Congress of the United States, or to injure

any citizen in person or property on account of such support or advocacy; in any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citized of the United States, the party so injured or deprived may have an action for the recovery of damages occasioned by such injury or deprivation, against any one or more of the conspirators.

15 U.S.C.A. § 1011: Declaration of Policy

Congress declares that the continued regulations and taxation by the several States of the business of insurance is in the public interest, and that silence on the part of the Congress shall not be construed to impose any barrier to the regulation of taxation of such business by the several states.

U.S. CONSTITUTIONAL AMENDMENT XIV

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

OTHER AUTHORITIES:

WISCONSIN ADMINISTRATIVE CODE

Rule Ins. 4.10 Wisconsin Insurance Plan. (1) Purpose. This rule is intended to implement and interpret Chapter 619, Wis. Stats., for the purpose of establishing procedures and requirements for a mandatory risk sharing facility for basic property insurance coverage. The implementation of the plan shall be in accordance with the urban property protection and reinsurance act of 1968,

P. L. 90-448, 82 Stat. 476. This rule is also intended to encourage improvement and reasonable loss prevention measures of properties located in Wisconsin and further orderly community development.